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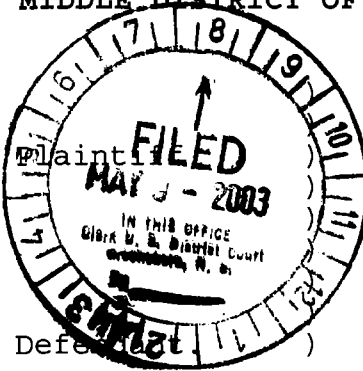
JW

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SEAN BENNETT,

v.

PRIME TV, LLC,



1:02CV00611

O R D E R

This matter comes before the Court on two motions. First, plaintiff has made a motion for Rule 11 sanctions. Second, defendant has made a motion for a protective order against certain discovery sought by plaintiff.

I.

Plaintiff filed a motion for Rule 11 sanctions. He raises three grounds for the motion. First, plaintiff states that during certain deposition testimony, counsel for defendant objected to every substantive question in order to harass and frustrate counsel for plaintiff. Second, with respect to a deposition of one witness, defendant filed a motion for a protective order on the Friday before a Monday deposition. (Protective Order, docket no. 37) Third, defendant's counsel requested that local counsel to be present at certain depositions.¹

¹Defendant responds that with respect to the objections mentioned by plaintiff, they were only objections to the form of the questions, except in two instances. Defendant argues that such objections in no way constitute, much less approach, the egregious conduct which the courts found sanctionable in the cases cited by plaintiff. With respect to the motion for a protective order, defendant points out that it only filed the motion after conferences among the parties failed to reach a satisfactory resolution. As to defendant's request that plaintiff have local counsel available during certain depositions, defendant

(continued...)

Defendant opposes plaintiff's motion for Rule 11 sanctions. Defendant contends that the motion is frivolous and that instead, defendant should be awarded fees for having to respond to the motion. Defendant first points out that a Fed. R. Civ. P. 11(c)(1)(A) motion must be served as provided for in Fed. R. Civ. P. 5, but may not be presented to the Court unless, within twenty-one days, "the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Rule 11(c)(1)(A). Defendant points out that not only did plaintiff not comply with this procedure, but that the subject matter of his request for sanctions does not fall within the ambit of Rule 11. Rule 11 applies when a party signs a pleading, written motion or other paper which is presented to the Court. Rule 11(a)&(b). Rule 11, by its own terms, specifically exempts discovery disputes and matters such as that raised in plaintiff's motion for sanctions. Rule 11(d); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 442 (D. Md. 2002).

Defendant seeks an award of fees because plaintiff has filed a frivolous motion. This same problem was faced by the district court in Texas in Connecticut General Life Ins. Co. v. Thomas, 910 F. Supp. 297 (S.D. Tex. 1995). There, an attorney filed a Rule 11 motion for sanctions contending that a party's motion for summary judgment was improper because witnesses were not revealed in prior

¹(...continued)

states that a deputy clerk advised defendant that, although the local rules were not clear, local counsel was expected to be at depositions. However, defendant points out that plaintiff ignored defendant's request in any event and that local counsel never did attend any depositions.

pleadings. The court rejected the contention and instead found that it was the attorney filing the motion who had failed to make a reasonable inquiry into the requirements of Rule 11. Unlike plaintiff's attorneys in the instant case, the attorney in Connecticut General actually gave a three-day notice of an intention to file Rule 11 sanctions prior to filing the pleading. What the attorney did not do was wait the twenty-one days required by the rule. Second, as is true in the instant case, that court found that "disclosure and discovery disputes are specifically exempted from the scope of Rule 11 sanctions." Id. at 305. Finally, the court found that because the Rule 11 motion was completely baseless and unjustified, an award of expenses and attorney's fees to the responding party was justified under Rule 11(c)(1) in the amount of \$750.00.

For the reasons the court discussed in Connecticut General, supra, the Court here, likewise, finds that plaintiff failed to make reasonable inquiry into the requirements of Rule 11 and disregarded both the spirit and the letter of Rule 11 by failing to give defendant a twenty-one day notice period. Second, the motion itself is without any factual or legal basis to sanction defendant under Rule 11. In fact, Rule 11 specifically excludes the disputes raised by plaintiff. In such situation, Rule 11 provides that the prevailing party is entitled to attorney's fees and expenses. Rule 11(e)(1)(A). The only factor the Court can find in plaintiff's attorneys' favor is that they did not file a reply to defendant's response. On the other hand, after defendant informed plaintiff's attorneys of the inappropriateness of their motion, plaintiff's

attorneys failed to withdraw the motion. Plaintiff's attorneys have caused this Court to spend unnecessary time considering an utterly frivolous motion. Consequently, the Court finds an award of expenses and attorney's fees is appropriate.

As the court found in Connecticut General, when the attorney disregards the clearly mandated prerequisites to Rule 11 and files a frivolous motion, the party should not be responsible for the assessment of costs and expenses, but rather the attorneys should be held responsible. The attorneys who signed plaintiff's motion are Lee Breedlove and local counsel Angela Newell Gray. They are jointly and severally responsible for paying the fees and expenses. In regard to calculating the fee, it is obvious that defendant's counsel had to spend a number of hours to prepare the response, including research and briefing. An award of full attorney's fees and expenses would run into many hundreds of dollars. In order to encourage cooling, if not reconciliation, on both sides and to curtail satellite litigation, the Court will give plaintiff's attorneys an opportunity to avoid further litigation by, within twenty days from the date of this order, paying to defendant fees and expenses in the amount of \$250.00.

II.

Defendant filed a motion for a protective order against plaintiff's second set of document requests. Defendant contends this discovery is over broad, unduly burdensome, and seeks confidential proprietary information. Defendant shows that this discovery was served on March 4, 2003 and seeks documents relating not only to Prime TV, but all corporations affiliated in any fashion

with Prime TV. It also seeks all of Prime TV's financial records and documents relating to all companies in which David or Annette Hagen, who are managers of Prime TV, have managerial or financial interest.

The Court finds that the discovery sought is overly broad and burdensome. It seeks information from entities which have not employed plaintiff. While the financial status of Prime TV may well be a matter for discovery, this can be sought by more refined questions than "all financial documents in the possession of Prime TV."

Plaintiff has not responded to oppose the motion. Thus, the motion may be granted. Also, there was a discovery cutoff of March 18, 2003. This Court's local rule requires that all discovery be filed so that the answers are due within the discovery period. Local Rule 26.1(f). Plaintiff's discovery requests, therefore, are untimely, and will be denied for this reason as well.²

IT IS THEREFORE ORDERED that plaintiff's motion for Rule 11 sanctions (docket no. 32) be, and the same hereby is denied. Because the Court finds plaintiff's motion to be frivolous for the reasons stated in the body of the opinion, and because plaintiff failed to follow Rule 11 procedure, the Court further awards full expenses and attorney's fees to defendant for defending the motion. Said award of costs and fees shall be paid by plaintiff's attorneys, Lee Breedlove and local counsel Angela Newell Gray, but they may

²It should be noted that an order was entered on March 19, 2003 extending discovery by thirty days, but this order was vacated on April 3, 2003 when the Court found that it had been misled by plaintiff, who had informed the Court that a trial date had not been set when, in fact, one had been set.

avoid the payment of full fees and costs by, within twenty days from the date of this order, paying to defendant the sum of \$250.00 in lieu of full costs and fees. Should plaintiff's counsel fail to pay within the time period, the Court is to be notified and the matter will be set for hearing. In that event, defendant's counsel shall file an affidavit of costs and expenses five days prior to the hearing.

IT IS FURTHER ORDERED that defendant's motion for a protective order against having to answer plaintiff's second set of document requests (docket no. 38) be, and the same hereby is, granted.


United States Magistrate Judge

May 9, 2003